Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 65 and 69 of	)	
the Commission's Rules to Reform	)	CC Docket No. 92-133
the Interstate Rate of Return	)	
Represcription and Enforcement	)	
Processes	)	

COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby submit Comments in accordance with the Commission's Notice of Proposed Rulemaking and Order ("Notice"), FCC 92-256, released July 14, 1992, in the captioned proceeding.

BellSouth actively participated in the preparation of the comprehensive set of comments being submitted in this proceeding by the United States Telephone Association ("USTA"). BellSouth adopts and endorses the views expressed in those comments, and will not repeat them here. In this pleading, BellSouth will offer additional comment on two matters raised in the Notice.

In paragraph 30 of the Notice, the Commission proposes to eliminate the possibility of a separated trial staff. In paragraph 35 of the Notice, the Commission proposes to expand the role of Bureau information requests in the development of the record. BellSouth views these two proposals as inconsistent. If the Commission foresees a significant role for the Bureau in formulating and

developing the record, it should separate a trial staff within the Bureau to perform that function.

As the USTA comments correctly note, no staff members advising the Commission in a represcription proceeding should have a view in advance as to the appropriate rate of return that should result.[1] If the Commission wants the staff to take an active role in developing the record, it should separate a trial staff from the deliberative staff of the Commission, and assign the trial staff party status. This would allow all parties an opportunity to review and comment on the recommendations of the trial staff.

In the last two represcription proceedings, the staff has taken an active role in the development of the record. In BellSouth's view, this role has deprived the parties of a legitimate opportunity to evaluate and comment on the positions being advocated by the Bureau within the Commission.

In the 1990 represcription proceeding, the Bureau ordered the carriers subject to mandatory filing requirements to file data to support a particular version of the annual Discounted Cash Flow ("DCF") model that was then the subject of comment in CC Docket No. 87-463. Subsequently, the Commission placed almost sole reliance on the results of the Bureau's analysis of that version of the DCF model, to the exclusion of the methodologies codified in

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[1]USTA Comments at 211.

the Part 65 Rules, and to the exclusion of the substantial amount of evidence submitted by the parties to the represcription proceeding. In short, the Bureau inappropriately assumed the role of both prosecutor and judge in the 1990 represcription proceeding.

To the extent that the Commission views it advisable to have the Bureau perform an active role in the development of the record in the represcription process, the Commission should retain and implement the concept of a separated trial staff in such proceedings.

With regard to enforcement mechanisms, the Notice clarifies that the authorized rate of return is simply a point within a broader zone of reasonableness:

> We reiterate that the rate of return we prescribe is a point within a broad zone of reasonableness. This point is neither the maximum nor minimum necessary to meet constitutional standards. Instead, it is a point selected, based on our consideration of all relevant factors, from within a zone that is narrower than the zone bounded on the lower end by the constitutional minimum. We will continue to adhere to this view of our rate of return prescriptions.[2]

BellSouth concurs with this view of the Commission's authorized rate of return. The Commission has never attempted to set the authorized rate of return at either the upper or lower end of the constitutionally permitted zone of reasonableness. However, by characterizing the authorized rate of return as a "prescription" and by characterizing any

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[2] Notice, para. 97.

earned return in excess of this level, plus a small buffer, as "unlawful", the Commission has created a fundamental inconsistency that the courts have repeatedly rejected.

If the Commission intends to view the authorized rate of return, plus a buffer, as a "prescription" under Section 205 of the Communications Act, such that any earned return in excess of this level is "unlawful", then the Commission must set the buffer at the upper end of the constitutionally defined "zone of reasonableness". If the Commission does not wish to define the upper end of the constitutionally defined "zone of reasonableness", then it must revise its view of the role of the authorized rate of return.

Based on the Commission's stated intent to define a "zone of reasonableness" for ratemaking purposes more narrowly that the constitutional maximum or minimum, BellSouth respectfully submits that the Commission must change its view of the role of the authorized rate of return in its enforcement mechanisms. If the authorized rate of return is simply a point within the "zone of reasonableness", then the Commission may not lawfully penalize a carrier, either by means of refunds or damages in a complaint proceeding, for earning a return above the authorized rate of return that is still within the constitutionally defined "zone of reasonableness".

The authority of the Commission to prescribe a rate of return was first recognized by the courts in Nader v. FCC,

520 F.2d 182 (D.C. Cir. 1975). In that case the FCC bifurcated an AT&T rate case, Docket 19129, into two phases. In Phase I, the Commission adopted a fair rate of return to be applied in developing AT&T's interstate tariffs. In Phase II, the Commission determined the relationship between Western Electric's earnings and AT&T's regulated revenue requirement.

In a separate but related proceeding, Docket 18128, the Commission dealt with rate relationships among various classes of service and with cross subsidy issues.[3] When the Commission concluded Phase I of Docket 19129, it determined that a reasonable overall rate of return for AT&T was 8.5%, and that as a result AT&T had a revenue deficiency under existing rates. It rejected AT&T's proposed tariffs that were premised on a higher rate of return, but authorized AT&T to submit new tariffs that would increase revenues by $145 million on an interim basis.

MCI appealed on the basis that this interim authorization and the underlying rate of return finding constituted prescriptions. MCI argued that the prescriptions were illegal because the Commission had not complied with the provisions of Section 205 of the Communications Act in determining the distribution of the additional revenue requirement among the various classes of

[3]Nader v. FCC, 520 F.2d at 189.

service provided by AT&T.[4]

The Court of Appeals held that although the Commission had prescribed a rate of return, it had not prescribed the interim rates. The impact of a rate of return prescription was characterized as authorizing AT&T to initiate higher rates to implement the revised rate of return. Such rates would be insulated from attack on the basis that 8.5% was an excessive rate of return, but would not be insulated from attack on the basis that the rates were unreasonably discriminatory, since the Commission had not completed its rate structure investigation.[5] The Court clearly viewed a rate of return prescription as a component part of a rate prescription. It stated:

> Additionally, since the rate of return is one component of a charge, and the charges prescribed must properly reflect the allowable rate of return, the prescription of a rate of return is fully consistent with the prescription of charges. [Citation deleted] These factors convince us that within the power to prescribe charges is the power to determine and prescribe those elements that make up the charge.[6]

BellSouth respectfully submits that the proper interpretation of a rate of return prescription is to require a carrier to submit a schedule of rates that are targeted to produce the prescribed rate of return. The Commission retains ample statutory authority to ensure

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[4] Id. at 199-200.

[5] Id. at 202-203.

[6] Id. at 204.

compliance with such a prescription. Section 204(a) of the Communications Act authorizes the Commission to investigate carrier-initiated rate changes to ensure their lawfulness, including their compliance with a rate of return prescription. If the Commission has doubts about whether the rates are properly targeted to produce the authorized rate of return, it is authorized to suspend and investigate the rates. If having suspended and investigated the rates, the Commission finds that they were not properly targeted to produce the authorized rate of return, the Commission is empowered to order refunds with interest by Section 204(a). Furthermore, if rates are properly targeted to produce the authorized rate of return, but with the passage of time they begin to produce an excessive rate of return, the Commission is empowered by Section 205 to initiate a proceeding to reduce the rates prospectively to a reasonable level.

BellSouth urges the Commission to adopt this view of the effect of a rate of return prescription in this proceeding. The Commission, the carriers and their customers have been embroiled in years of litigation over the effect of a rate of return prescription that could have been avoided had the Commission adopted the view that the effect of a rate of return prescription is to require carriers to propose a schedule of rates that are targeted to produce the authorized rate of return.

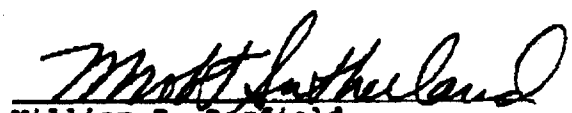
In short, BellSouth believes that the Commission's

existing tariff review mechanisms provide ample means of "enforcing" a rate of return prescription without the need for an "enforcement mechanism" in Part 65 of the Commission's Rules. BellSouth therefore concurs with the conclusion in the Notice that the Commission should not attempt to adopt an "automatic refund rule" in Part 65.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By its Attorneys:



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